

No. 11286.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

*Appellants,*

*vs.*

HAROLD LLOYD CORPORATION, a California Corporation,

*Appellee.*

---

HAROLD LLOYD CORPORATION, a California Corporation,

*Appellant,*

*vs.*

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

*Appellees.*

---

Appellant Bruckman's Reply to Brief for Appellee,  
Harold Lloyd Corporation.

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DEC 14 1946

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Appellant Bruckman's Reply to Brief for Appellee,  
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**Statement.**

Unable to point out anything wrong with our Statement of the Case, appellee's counsel undertakes to characterize our Statement as "merely a highly colored argument." (Appellee's Br. p. 13.) This characterization, if we may say so, is mere *brutum fulmen*. Our Statement is, of course, not "merely a highly colored argument." Indeed, it is not an argument at all except in the sense that any fair and adequate statement of the case on appeal is, as Justice Field long ago expressed it, "more than

half the argument.” In any event, our “Statement of the Case” stands unchallenged.

It is unnecessary to restate the facts or again argue the law at length.

Inasmuch, however, as appellee by weaving in, about, and around, has managed to keep itself at arm’s length from both the facts and the law, we believe it is well, first, to summarize the controlling facts, next to catalogue appellee’s admissions by silence and acquiescence, its express admissions, and its contentions relative to the facts, and then summarize the controlling authorities, show that appellee has not met them and that the affirmative portions of appellee’s brief are unsound.

This may, we trust, make it a bit clearer than it already is that the judgment must be reversed:

1. Unless the copyright monopoly given to dramatic compositions by Section 1(d) of the Copyright Act is to be enlarged so as to include mere burlesque consisting of six or eight gags and pieces of stage business, even though such burlesque is in the public domain, is not an integral part of “Movie Crazy,” and “Movie Crazy” as a whole (particularly the portions which are original), is not drama and the six or eight gags and pieces of stage business borrowed were used differently and to a different purpose in “So’s Your Uncle.”

2. Unless appellee is entitled to disregard the implied finding that all the expert testimony is false, the implied finding that there were no general damages, and the express finding fixing special damages in a lump sum for injury to appellee’s reissue and remake rights, without allocation, even though appellee’s remake rights are admittedly not within its copyright monopoly.



I.

The Controlling Facts.

A.

AS TO LIABILITY.

1. The magician's coat routine in "Movie Crazy" does not portray life or tell a story. (Our Op. Br. pp. 9, 10, 49-57.)

2. The magician's coat routine is not an integral part of "Movie Crazy" as a whole (in so far as it has a story), because the routine does not advance or impede Harold in getting a job. (Our Op. Br. pp. 12, 17, 24, 37.)

3. The "story" and the story incidents in "Movie Crazy" are borrowed from "Small Town Idol," "Extra Girl," and "Merton of the Movies." (Our Op. Br. pp. 22, 23.)

4. The comedy routines in "Movie Crazy," including the magician's coat routine, are all commonplace, i. e., in the public domain. (Our Op. Br. pp. 17-26; 37-49.)

5. The only originality in the magician's coat routine, or in "Movie Crazy" as a whole, is in the particular combination of gags and pieces of stage business,\* and the

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\*It may be pointed out that we have used the phraseology "gags and stage business" in the same sense in which it is used by Lloyd himself and by this and other American courts, the protestations in Appellee's Brief to the contrary notwithstanding. (Appellee's Brief pp. 44-52.) Lloyd testified:

"Q. You have spoken upon occasions about what you have termed 'gags' in these pictures that you have made. Just what do you mean by the use of the term 'gags'? How would you define that term? A. I will define it in a comedy scene in the particular sequence we are talking about, where the comedy scene is where the waiter brings in the plate with a cover

order in which they appear. (Our Op. Br. pp. 9, 10, 17-27, 37.)

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over it and the rabbit inside. The actual gag is where the man lifts off the cover and sees the rabbit and thinks he has snakes or something. Another one could be where they stop and are introduced to another party and the actual squirting out of the water is the gag itself. Q. So that each of those pieces—those are really what you call 'pieces of business,' Mr. Lloyd, pieces of comedy business? A. They are gags within a comedy scene and these comedy scenes make up the whole sequence. Q. Oh, each one considered separately, then, you define as a gag? A. The actual happening is the gag, the little—. [Tr. pp. 136-137.]

In *Harold Lloyd Corporation v. Witwer*, 9 Cir. (1933), 65 Fed. 2d 1, one of the writers of the Harold Lloyd Corporation, produced by that Corporation, testified as follows:

"That was the first sequence, you understand, and gags were to be hung on that. \* \* \* and there was to be a routine of gags at the station, showing the college atmosphere, such as slapping the dean of the college on the back and riding off in his car by mistake and such things as that." (p. 10.)

On the basis of this testimony, the court commented:

"Consequently there was no effort to reproduce some such humorous situation in the story, but the purpose was to create a separate distinct sequence in the case of each gag to produce laughter on the part of the audience." (p. 10.)

The court also made the following comment:

"This inchoate plan, antedating all contact with Witwer or his story, necessarily involved the use of Harold Lloyd as the hero of the play and experiences which he would have in attending college, and numerous gags in accordance with the general set-up of all the Lloyd plays." (p. 16.)

In *Bloom & Hamlin v. Nixon*, C. C. E. D. Pa. (1903), 125 Fed. 977, the court referred to "the rather striking impertinence" of making one of the audience uncomfortable by singling him out and singing to him, as "stage business." (Our Op. Br. p. 57.)

In *Tate v. Fullbrook* (1908), 1 King's Bench Division 821 (Court of Appeal) the court referred to "comic business" consisting of a cracker being placed by a street urchin under and exploded by the foot of one of the characters, and also says, "expressions were introduced into the defendant's piece by way of 'gag' which had been taken from similar 'gag' in the plaintiff's piece as performed." (Our Op. Br. p. 57.)

In short, while gags and stage business are differentiated in the English case, Lloyd's testimony and the American cases use the term "gag" as including both "expressions" as well as acts.

6. The only similarities in "Movie Crazy" and "So's Your Uncle" are in six or eight gags and pieces of stage business in the magician's coat routines and the order in which they appear. (Our Op. Br. pp. 9, 10, 13, 14, 15.)

7. These six or eight gags and pieces of stage business are used differently in the two pictures:

(a) There is no similiarity between the story in "So's Your Uncle" and the story in "Movie Crazy," in so far as it has a story.

(b) The ages, appearances, and costumes of Steve and Harold, and the dialogues, are altogether different.

(c) The characters of Harold and Steve are altogether different.

(1) Harold is a stupid, timid, and unsophisticated country boy, while Steve is an independent, self-assured, and brash man of the world.

(2) Harold has a genius for making grotesque mistakes which recoil on him to his own embarrassment, while Steve uses bold and cheeky stratagems by which he overcomes every difficulty.

(d) There is no resemblance between the characters in the two routines, other than Harold and Steve.

(e) In "Movie Crazy" there is no character corresponding to Joe in "So's Your Uncle." (Our Op. Br. pp. 15, 16.)

8. The six or eight gags in question are used to an altogether different purpose in the two pictures:

(a) In "Movie Crazy" the routine is built entirely around embarrassment to Harold and resulting sympathy for him. Harold gains admittance to the dinner dance, which is a private party, by mistake; he gets into the magician's coat by mistake; he makes his dancing partner the butt of his gags and stage business; he gets his face slapped; he is unmasked by the magician; mistake of the invitation is discovered; and he is literally thrown out.

(b) In "So's Your Uncle" Steve goes to the night club rightfully; Joe gets the magician's coat for Steve, knowing it is a magician's coat; members of Steve's party are not victims of the gags and stage business; Joe gets the blame; and Steve emerges triumphant, with increased prestige with Pat. (Our Op. Br. p. 16.)

## B.

### AS TO DAMAGES.

(a) There is no direct evidence as to damages, and no relevant data from which it can be inferred, other than the testimony of expert witnesses. (Our Op. Br. pp. 28-34.)

(b) The trial court expressly stated it disbelieved all the expert witnesses. (Our Op. Br. p. 33; Tr. p. 522.)

(c) There is an implied finding that all of the testimony of the expert witnesses is untrue. (Our Op. Br. p. 63; see also our Brief on Cross-Appeal, pp. 3-4.)

(d) No evidence was presented as to general damages. (Our Op. Br. pp. 28-34.)

(e) There is an implied finding that there were no general damages. (Our Op. Br. p. 63; Tr. p. 36.)

(f) The findings fix special damages in a lump sum, without allocation for damage to reissue and remake rights. (Our Op. Br. p. 7.)

(g) The finding of special damages in the sum of \$40,000.00 was in turn based on the finding that appellants copied 57 consecutive scenes, including "characters, characterization, motivation, treatment, action and sequence of action," and the latter findings were contrary to the evidence. (Appellee's Br. p. 27; Our Op. Br. pp. 9-28; *Infra* # 2(b).)

## II.

### Controlling Facts Not Met.

#### 1. Appellee admits:

(a) That the "story" and story incidents in "Movie Crazy" are borrowed from "Small Town Idol," "Extra Girl," and "Merton of the Movies." (*Ante*, IA, par. 3.)

(b) That the comedy routines in "Movie Crazy," including the magician's coat sequence, are commonplace, that is, in the public domain. (*Ante*, IA, par. 4.)

(c) That the only originality in the magician's coat routine, or in "Movie Crazy" as a whole, is in the particular combination of gags and stage business, and the order in which the gags and stage business appear. (*Ante*, IA, par. 5.)

(a) above is admitted by silence and acquiescence;

(b) and (c) above are expressly admitted. (Appellee's Brief, p. 31.)

2. Appellee denies:

(a) That the only similarities in "Movie Crazy" and "So's Your Uncle" are in six or eight gags or pieces of stage business and the order in which they appear. (*Ante*, IA, par. 6.)

(b) That these six or eight gags and pieces of stage business are used differently, or to a different purpose, in the two pictures. (*Ante*, IA, pars. 7 and 8.)

Appellee relies on the findings "that 57 consecutive scenes (1000 continuous feet of film in the seventh and eighth reels consisting of approximately 20% of plaintiff's motion picture photoplay) had been 'knowingly, wilfully and deliberately copied, misappropriated, and plagiarized by defendants,' 'including characters, characterization, motivation, treatment, action and sequence of action.' " (Appellee's Br. p. 27.)

But these findings are contrary to the evidence.

The direct evidence is summarized in our Opening Brief as follows:

"At the time 'So's Your Uncle' was in preparation by Universal, Bruckman was employed as a gag writer. Bruckman never heard of 'So's Your Uncle' until the scenario had been completed. As completed [i. e., before Bruckman heard of it] the scenario had a dance sequence at a night club, in which Steve, the hero, appeared both as his uncle and in his own character. [Tr. pp. 231, 235.] Mr. Yarbrough, the producer, handed Bruckman the scenario, saying he needed some comedy in the dance sequence. [Tr. p. 236.] He did not tell Bruckman what comedy material to introduce. [Tr. p. 236.] Bruckman typed up comedy material consisting



of stage business connected with the magician's coat sequence, which later appeared in the picture as released. [Tr. p. 229.] He brought this to Yarbrough's attention. \* \* \* Yarbrough handed the typewritten material prepared by Bruckman to Maurice Leo [the] scenario writer, for inclusion in the scenario. [Tr. p. 229.] Asked by plaintiff's counsel as to his conversation with Yarbrough, Leo testified 'The substance was that he brought this material, \* \* \* and he thought it would work very well into our night club sequence; and he gave it to me and I looked at it and, if I am not mistaken, I was not too enthusiastic over it because I thought it was dated and old-fashioned; but he seemed to think that, despite that fact, he wanted to use it and he was the producer and so I used it. [Tr. p. 221.]" (Our Op. Br. p. 27.)

Leo, who was a disinterested witness called by appellee, expressly testified that at the time Yarbrough handed him Bruckman's material, the scenario already showed that the hero knew he would have to appear at the night club both as a young man and the uncle, and also showed the hero going into the washroom and taking the coat of the washroom attendant in order to masquerade as the uncle. [Tr. p. 228.] At the request of appellee's counsel, Leo produced the scenario as he had prepared it before the inclusion of the gags and stage business, but the document was not offered in evidence. [Tr. pp. 214-215, 218.] Leo testified that he had never met Bruckman [Tr. p. 219], and that he had no recollection of ever having seen "Movie Crazy." [Tr. p. 226.]

No inference adverse to this direct testimony is justified from a comparison of the two pictures.

Appellee asks the Court to compare "Plaintiff's Ex. 3, copy of the continuity and dialogue of 'So's Your Uncle', Reel 4, pp. 1-9, incl., Scenes 1 to 57, incl., with Plaintiff's Ex. 5, continuity and dialogue of 'Movie Crazy,' Reel 7, Scenes 22-25, pp. 6-8; Reel 8, Scenes 1-57, pp. 1-10, incl." (Appellee's Br. pp. 27-28.)

Not only would such comparison yield nothing, but the so-called Exhibit 5 is not even in evidence; it was merely marked for identification. [Tr. p. 349.] Appellee, however, undertakes to make the comparison on the basis of the Exhibit and the Exhibit for identification, in his Appendix II entitled "The Deadly Parallel," at pages 19-25.

"The Deadly Parallel" hoists appellee on his own petard.

"The Deadly Parallel" shows that the only materials borrowed were (1) the hero dancing in a magician's coat; (2) a miniature clothes line being pulled out of the hero's coat as it is caught on a woman's dress; (3) a dove flying out of the hero's coat; (4) the hero squirting water into a woman's face from a boutonniere on the lapel of his coat; (5) the hero pulling a white rabbit from his coat, placing it on a serving dish, placing a cover over it, and having it served to a man, and the man's reactions; (6) the hero slipping an egg from his sleeve, and observing a man trying to kill a fly near his head, the hero placing the egg in the man's hand, and the man smashing the egg on his head thinking he is killing a fly; (7) a mouse climbing on the hero's shoulder, which causes women to scream; and (8) the hero pulling a box of mice out of his coat, dropping it on the floor, letting



the mice loose among the dancers, and thereby causing pandemonium.

Inasmuch as appellee castigates our co-appellant unmercifully for asserting that the appeal “is from a judgment \* \* \* holding that plaintiff’s copyright \* \* \* has been *infringed by the use of six gags or pieces of stage business used in a comedy routine in the motion picture of defendant Universal*” (Italics are appellee’s) (Appellee’s Br. p. 2), it is, perhaps, not too unkind to suggest that appellee and its “deadly parallel” remind one of the old Mountain that labored and brought forth a mouse.

3. Appellee denies:

That the magician’s coat comedy routine does not portray life or tell a story. (*Ante*, IA, par. 1.)

In that behalf appellee states our position as follows:

“Both appellants strongly urge that the sequence in question is not protectible under the Copyright Laws because it consists merely of isolated ‘gags,’ ‘stage business,’ ‘clowning,’ and ‘sleight-of-hand tricks’ which constitute ‘grotesque, hobbledohoy’ and which do not contain ‘a thread of consecutively related events.’ ” (Appellee’s Br. p. 27.)

Appellee then makes the dogmatic assertion:

“We submit that a bare inspection of the sequence in question answers appellant’s arguments.” (Appellee’s Br. p. 27.)

Appellee then complains that “Appellant Bruckman attempts to minimize the misappropriation by a reduction to thirty-three lines.” (Appellee’s Br. p. 28.) But appellee does not challenge the accuracy of the subdivision of our Statement of the Case referred to by him, which is en-

titled "Plaintiff's Comely Routine" (Our Op. Br. pp. 9-10). This subdivision is a fair and accurate account of the scene at the dinner dance and shows that that scene does not portray life or tell a story but, on the contrary, is made up of isolated gags, stage business, clowning and sleight-of-hand tricks which constitute grotesque hobbledoy. In short, that the scene is burlesque, and nothing but burlesque.

The column of appellee's "deadly parallel" which relates to "Movie Crazy" shows the same thing. (Appellee's Br., Appendix II, pp. 19-25.)

4. Appellee denies:

That the magician's coat sequence is not an integral part of the story in "Movie Crazy." (*Ante*, IA, par. 2.)

In that behalf appellee relies on the testimony of Lloyd. We quote from Appellee's Brief:

"Lloyd's evidence was that 'the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into it the story is certainly destroyed'; that the sequence is an 'integral and essential part of the story and plot' of 'Movie Crazy' and 'plays a functional part in the development of the picture.'" (Appellee's Br. p. 29.)

The testimony was received over our objections. [Tr. p. 138.]

Adler, who was not in the employ of Universal, on cross-examination by appellee's counsel, testified to the contrary. [Tr. p. 332.]

Hirleman, another disinterested witness, testified that in his opinion the sequence showing the dinner dance was not an integral part of "Movie Crazy" because:

"Harold Lloyd does not meet with the head of the studio, which would have made good sense at the end of the story, and when he promotes him and gives him the job he doesn't even know about it; it could be left out of the picture but he could still be rewarded at the end and get his job and so forth and nobody would ever know whether that was in there or not; there is nothing connected with that sequence with what was going on between Harold Lloyd and the producer; nothing to show the wife ever told the producer and the producer ever found it out." [Tr. pp. 447-448.]

Not only is Lloyd contradicted by disinterested witnesses, but, in addition, the manner in which Lloyd's testimony was elicited really destroys the testimony:

"Q. (By Mr. Fendler): Is there any relationship to the story of the gags of the comedy scenes in Movie Crazy? A. The whole sequence is naturally tied into the story. It is the heart of the story, and without that particular sequence tied into it the story is certainly destroyed.

\* \* \* \* \*

Q. Is that an integral and essential part of the story and plot of Movie Crazy? A. Yes, it is.

Q. And does it play a functional part in the development of the picture? A. In my opinion, it does." [Tr. pp. 137-139.]

It will be observed that counsel in his questions uses the phraseology used in the authorities relied on by us as to

the objective criteria for determining whether the borrowing was substantial (Our Op. Br. pp. 44-45; *infra* III, par. 9), and Lloyd conveniently undertakes to decide the case in his favor by applying these criteria.

But apart from all this, Lloyd's testimony was clearly inadmissible, and is entitled to no weight whatever, because the question whether a comedy routine is an integral part of a story is not the subject of opinion evidence but is a question which the Court must decide from its own examination of the document.

13 *Corpus Juris* 1215;

18 *Corp. Juris* Sec. 271;

*West Publishing Co. v. Edward Thompson Company*, C. C. E. D. N. Y. (1909), 169 Fed. 833;

*West Publishing Company v. Lawyers Co-op. Pub. Co.*, 2 Cir. (1897), 79 Fed. 756;

*Simonton v. Gordon*, D. C. S. D. N. Y. (1924), 297 Fed. 625.

Appellee really concedes the point when he says, referring to the dinner dance scene:

"the career of the young hero is not affected adversely by his confusion and embarrassment at the night club [*sic.*] and eventually plaintiff's actor gets his long-wanted contract to act." (Appellee's Br. p. 29.)

This is obviously the fact. It clearly follows that the gags and stage business borrowed, or for that matter the entire dinner dance scene, was not an integral part of "Movie Crazy" as a whole because it neither advanced nor impeded Harold in getting a job. (See our Op. Br. pp. 12, 17, 24, 37.) A scene at the apartment of Mary, or

at a railroad station, might as well have been inserted as the dinner dance scene; Harold might as well have been shown as a makebelieve magician, drawing intoxicating liquor from a water jug as in *Glaser v. Hoffman* (1943), 159 Fla. 809 (our Op. Br. pp. 44-45); or Harold might have been shown losing parts of his clothing, or doing one or another of the thousands of gags or pieces of stage business which the testimony shows all comedians do. [Tr. p. 338; our Op. Br. p. 36.]

### III.

#### Controlling Authorities.

The controlling authorities are:

1. *Seltzer v. Sunbrook*, D. C. S. D. Calif. (1938), 22 Fed. Supp. 621, cited with approval in *Corcoran v. Montgomery Ward & Co.*, 9 Cir. (1941), 121 Fed. 2d 572. (Our Op. Br. pp. 50-52.)

(Holding that entertainment is not dramatic composition within the protection of Subdivision (d) of Section 1 of the Copyright Act, unless it tells a story, *i. e.*, "a thread of consecutively related events." (22 Fed. Supp. pp. 628-629).)

2. *Harold Lloyd Corporation v. Witwer*, 9 Cir. (1933), 65 Fed 2d 1. (Our Op. Br. pp. 38-44, 59.)

(Holding that the only originality protected by copyright is originality in theme or story (65 Fed. 2d at p. 22); that a subordinate sequence, not an integral part of the story as a whole, is not protected by copyright (*id.* pp. 25-27); that borrowing commonplace materials and using them differently does not constitute infringement, and differences in appearance, name, and character of the heroes,

and the use to which the materials are put, are sufficient to negative infringement (*id.* at p. 28); and that no one, by presenting with modern incidents a plot which is common property, can appropriate it by copyright (*id.* at p. 24).

3. *Corcoran v. Montgomery Ward & Co.*, 9 Cir. (1941), 121 Fed. 2d 572 (certiorari denied 314 U. S. 687). (Our Op. Br. pp. 49-50.)

(Holding that action without a theme or story does not constitute dramatic composition.)

4. *Frankel v. Irwin*, D. C. S. D. N. Y. (1918), 34 Fed. 2d 142. (Our Op. Br. pp. 48-49, 58.)

(Holding "Farces, which, unless at least suggestive of genuine human thoughts, desires, and intents, are mere slapstick clowning." (34 Fed. 2d at p. 144.)

5. *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, C. C. N. J. (1905), 137 Fed. 262, cited with approval in *Harper Bros. v. Kalem Co.*, 2 Cir. (1909), 169 Fed. 61, 63. (Our Op. Br. pp. 55, 56.)

(Showing that a motion picture show made up of slapstick comedy and action which does not tell a story is copyrightable only as a photograph.)

6. *Glazer v. Hoffman* (1943), 153 Fla. 809, 16 So. (2d) 53, and *Professor Jacko v. The State* (1853), 22 Ala. 73. (Our. Op. Br. pp. 44-45, 52-53.)

(Holding that magicians' tricks, sleight-of-hand, conjuring, and clowning do not constitute drama.)



7. *Barnes v. Miner*, C. C. S. D. N. Y. (1903), 122 Fed. 480. (Our Op. Br. pp. 44, 45-46.)

(Holding that a vaudeville act, with motion picture accompaniment, showing changing of costumes and an order of events, is not drama.)

8. *Chappell & Co. v. Fields*, 2 Cir. (1914), 210 Fed. 864; *Bloom & Hamlin v. Nixon*, C. C. E. D. Pa. (1903), 125 Fed. 977; *Tate v. Thomas* (1921), 1 Chancery Division 503; *Tate v. Fullbrook* (1908), 1 King's Bench Div. 821 (Court of Appeal). (Our Op. Br. pp. 56-57.)

(Holding that gags and stage business are not within dramatic copyright.)

9. *Caruthers v. R. K. O. Radio Pictures*, D. C. S. D. N. Y. (1937), 20 Fed. Supp. 906; *Serrana v. Jefferson* (1888), C. C. S. D. N. Y., 33 Fed. 347. (Our Op. Br. pp. 44, 45.)

(Holding that comedy incidents are not within copyright protection unless they form an integral part of, or are intrinsic to the development of, and constitute links in, the chain of incidents which tell a story.)

10. *Curweed v. Affiliated Distributors*, S. D. N. Y. (1922), 283 Fed. 223; *Rush v. Oursler*, D. S. C. D. N. Y. (1930), 39 Fed. 2d 468. (Our Op. Br. pp. 47-48.)

(Holding there is no infringement where dramatic incidents are borrowed and are used in different settings, or are borrowed and a different solution is made of a mystery portrayed.)

IV.

Controlling Authorities Not Met.

Appellee passes in complete silence all of the controlling authorities (*ante* III), except *Harold Lloyd Corporation v. Witwer*, *supra* (*ante* III, 2), *Barnes v. Miner*, *supra* (*ante* III, 7), *Bloom & Hamlin v. Nixon*, *supra*, *Tate v. Thomas*, *supra*, and *Tate v. Fullbrook*, *supra* (*ante* III, 8), and *Serrana v. Jefferson*, *supra* (*ante* III, 9). Even *Seltzer v. Sunbrook*, *supra* (*ante* III, 1) and *Corcoran v. Montgomery Ward & Co.*, *supra* (*ante* III, 3), are not mentioned, although those cases decided in this Circuit, either with or without the other cases omitted by appellee, are themselves controlling.

(a) HAROLD LLOYD CORPORATION V. WITWER.

In the *Witwer* case there were two issues, first, whether the similarities between the motion picture and the novel overcame the positive testimony of the witnesses that there was no copying? and secondly, assuming there was copying, did the copying constitute infringement? Both issues were decided by this Court against appellee, who was plaintiff in the District Court.

The first issue was not discussed in our Opening Brief, and is only incidentally involved here. (See *ante* II, 2.) As to that issue, although the similarities were far more numerous than they are here, Judge Wilbur said:

“It is clear that there is no such similarity as overcomes the positive testimony that there was in fact no copying.” (65 Fed. 2d at p. 28.)

Appellee undertakes to claim, on the basis of two excerpts lifted from their context, that the *Witwer* case does



not hold that the only originality protected by copyright is originality in theme or story, and that borrowing commonplace materials and using them differently does not constitute infringement. (Appellee's Br. pp. 55-57.)

When the excerpts relied on by plaintiff are read in their context, it will be seen that they have no bearing at all on those points, but, on the contrary, relate solely to the first issue, namely, whether the similarities overcome the direct evidence that there was no copying.

The two excerpts in their context are as follows (the excerpts from Appellee's Brief (p. 57) being italicized):

"That there are similarities between the play and the story is manifest and we proceed to consider the legal significance of such similarities. *The primary question is whether these similarities resulted from copying the story*; if not, the similarities are without legal significance." (65 Fed. 2d at p. 4.)

"This inchoate plan, antedating all contact with Witwer or his story, necessarily involved the use of Harold Lloyd as the hero of the play and the experiences which he would have in attending college, and numerous gags in accordance with the general set-up of all the Lloyd plays.

"If all this be true, then *the question of infringement is narrowed to whether or not in the subsequent development of the play there was an intentional or unintentional appropriation of incidents and sequences and scenes* of the story not yet developed at the time of the conference between Witwer and Harold Lloyd in October, 1924, above referred to. This inquiry, however, involves a rejection of the testimony that these witnesses never knew or read the story, for without such knowledge there could be no

copying and their production would have been original no matter how closely it resembled the story.” (65 Fed. 2d at p. 16.)

Appellee also claims that it appears from the *Witwer* case, on the basis of the application of “the ordinary observer rule”, infringement has been proved (p. 56). Again, appellee fails to distinguish between the two issues in the *Witwer* case. Indeed, it is expressly held in the *Witwer* case that the ordinary observer rule relates only to the first issue in the case, and not the second issue. Thus it is said in the opinion:

“In the case at bar, if it be assumed that there are such similarities between the story and the play as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable.” (65 Fed. 2d at p. 23.)

Appellee’s third point with reference to the *Witwer* case is that the term “subordinate sequence of events” as used in the case refers merely to a single episode (p. 55). Not only does the opinion in the case negative this (our Op. Br. pp. 39-44), but it is also negated by the brief of Harold Lloyd Corporation, who was appellant in that case and is appellee here.

In that brief the Harold Lloyd Corporation argued:

"2. Similarities do not constitute plagiarism unless they amount to an appropriation of matter which is protected by copyright and is substantial.

"The proposition stated in the heading, like the proposition last advanced, is supported by practically all the cases cited, particularly those at pp. 120-121 *supra*. The likenesses which have been considered in the decisions range from a single effect or episode, like the immersion scene in *Serrana v. Jefferson* (C. C. N. Y.), 33 Fed. 347, to the 455 alleged similarities on which the plaintiff unsuccessfully relied in *Lewys v. O'Neill* (S. D. N. Y.), 49 F. (2d) 603, 611." (Appellant's Brief in *Witwer* case, p. 147; see, also *id.* pp. 145-154.)

(b) BARNES V. MINER, SUPRA, BLOOM & HAMLIN V. NIXON, SUPRA, AND SERRANA V. JEFFERSON, SUPRA.

Appellee's only claim with reference to these cases is that they are distinguished in the opinion of Learned Hand, Circuit Judge, in *Sheldon v. Metro-Goldwyn Pictures Corporation*, 2 Cir. (1936), 81 Fed. 2d 49, 56. (Appellee's Brief pp. 45-47.) This is, however, not the case. All Judge Hand does is to point out that the cases in question do not hold that pantomime may not be dramatic (81 Fed. 2d at p. 55). That is, of course, beside the point here because pantomime tells a story and burlesque does not.

(c) ENGLISH CASES RELIED ON BY US.

Appellee argues that these cases, as well as other English cases, are of no aid to the Court because the language of the Copyright Act under which they were decided dif-

fers from the language of the United States Copyright Act, and also because the cases in question have been overruled by the passage of the British Copyright Act of 1911. (Appellee's Brief pp. 49-52.)

It is true that the language of the earlier English Copyright Acts restricted dramatic copyright to "something which can be printed and published." (Appellee's Brief p. 49.) That language, however, has been held by the English Courts to have substantially the same effect as the language of our own Copyright Act.

This appears from the opinion of Farwell, L. J., in *Tate v. Fullbrook*, *supra* (*ante* III, 8), from which we quote as follows:

"Nor do as I say that scenic effects may not be protected as part and parcel of the drama: scenes do of course form parts of drama, and it is the dramatic piece as a whole that is protected by the Act. It is essential, however, to such protection that there should be something in the nature of a dramatic entertainment, for a mere spectacle standing alone is no more within the Act than a singer who sings in character costume is in it." (1 King's Bench Division 821, at 832.)

The effect of the English Copyright Act of 1911 on the authority of the earlier cases in England is immaterial here because the English Act of 1911 is altogether different from the United States Copyright Act of 1909 as amended.

The matter is disposed of by the following from "Reflections on the Law of Copyright", by Zechariah Chafee, Jr. (1945), 45 *Columbia Law Review*, 403, 719:

"This ideal [a single monopoly] is embodied in the British statute.

"\* \* \* 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever". (p. 505.)

"The copyright law of the United States is quite different \* \* \*" Legislators, lawyers, and judges have broken up this unified subject into a series of isolated monopolies and isolated remedies". (p. 515.)

See, also, *Corcoran v. Montgomery Ward & Co.*, *supra*, at page 574. (Our Opening Brief pp. 59-60.)

## V.

### Appellee's Affirmative Positions Unsound.

#### (a) "MOVIE CRAZY" AS A WHOLE.

In support of its claim that "Movie Crazy" as a whole (including the story and story incidents, which we have shown are in the public domain) is protected by dramatic copyright, appellee argues that Section 201.4 of the Copyright Office is not declaratory of the case law in so far as it declares that "motion picture shows" are not dramatic compositions; appellee also cites cases holding that exhibitors who "bicycle" film for exhibition in unauthorized theaters are guilty of infringement, and cases involving copying of comic strips which are not dramatic at all. Appellee's Brief pp. 24-26.)

(1) Appellee's argument with reference to Section 201.4 of the Code of the Copyright Office is as follows:

"Of course the reason the Copyright Office does not permit classification of a 'motion picture show' as a dramatic or dramatico-musical composition is that Section 5 specifies thirteen classes of applications for registration, of which classification '(d)' is 'dramatic or dramatico-musical compositions'; classification '(1)' is 'motion picture photoplays,' and classification '(m)' is 'motion pictures other than photoplays.'" (Appellee's Brief p. 26.)

The short answer to this is that subdivisions (1) and (m) of Section 5 did not become part of the Copyright Act until the revision of 1912, while section 201.4 of the Code of the Copyright Office was promulgated in 1910 as Rule 8 of the Copyright Office, amended in 1936, and carried into the present act as Section 201.4 in 1942.

Bowker, *Copyright. Its History and Its Law* (1912), p. 497;

Amdur, *Copyright Law and Practice*, (1936), p. 134;

Ball, *Law of Copyright and Literary Property* (1944), p. 785;

U. S. C. A., Title 17, Section 53, 1944 Supplement p. 102.

In other words from 1910 to date the rules of the Copyright Office have declared "dances, motion picture shows; \* \* \* stage business; \* \* \* sleight-of-hand performances, acrobatic or circus tricks of any kind" are not dramatic compositions.

The reference to "motion picture shows" in Rule 8 as well as Section 201.4, is manifestly traceable to the case



of *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, C.C.N.J. (1905), 137 Fed. 262, just as the other portions of the Rule are traceable to other decided cases. (See Our. Op. Br. pp. 54-57.)

2. The "bicycling" cases do not support appellee. Besides involving unauthorized performances of motion pictures without compensation to the producers, all except *Patterson v. Century Productions*, D.C.S.D.N.Y. (1937), 19 Fed. Supp. 30, assumed, or expressly held, the several motion pictures involved were dramatic productions because they told a story. In *Patterson v. Century Productions*, *supra*, the defendant misappropriated a large portion of plaintiff's travel film, made photographic impressions thereof, and exhibited its own film with such impressions as a part thereof. It is unnecessary to determine whether that case was correctly decided. It probably was not.

The only case which reached a Circuit Court of Appeals and passed on the point involved in the bicycling cases is not cited by appellee. In that case, *Metro-Goldwyn-Mayer v. Bijou Theatre Co.*, 1 Cir. (1932) 59 Fed. 2d 70, it was held that a motion picture was not entitled to the protection of dramatic copyright unless it was based on a copyrighted novel, stage drama, or book. There is, of course, no showing whatever in the record before this Court that "Movie Crazy" was based on a copyrighted novel, drama, or book. The contrary was conceded in the court below. [Tr. pp. 495-506.]

The opinion of the District Court in the case last cited (50 Fed. 2d 908) distinguishes *Kalem v. Harper Bros.* (1911) 222 U. S. 55 (also relied on by appellee) as follows:

Referring to the *Kalem* case, the Court said:

“The point decided was as to the scope of the copyright on the novel ‘Ben Hur.’

“The present question is different. Here the film itself is the subject of the copyright. Nobody questions that the plaintiff has the exclusive right to control copying it. If the film were an ordinary photograph or transparency, nobody would contend that the mere exhibition of it violated the copyright. The understanding of Congress that it does not do so in the case of a moving picture film is established with very unusual clearness. The point was explicitly raised and discussed in connection with the amendments of 1912.” (50 Fed. 2d at p. 909).

See, also, our Opening Brief, Appendix, pages 7-14.

3. The inapplicability of the comic strip cases is shown by the following from *Fleischer Studios, Inc. v. Freundlich, Inc.*, 2 Cir. (1934), 73 Fed. 2d 276 (cited in Appellee's Brief at p. 38):

“What was copyrighted here did not come within the statutory classification. The cartoon characters displayed in bound leaf form constitute neither a printed literary, musical, nor dramatic work. To say that appellees' article is a book and as such is a literary work would be incorrect. The copyright act of April 29, 1802 (chapter 36, 2 Stat. 171), specifically mentioned a book. Section 18 of the present law does not. USCA, title 17, § 18. A book is one of the classifications of the present law and is copy-rightable as such. USCA title 17, § 5 (a). This book of cartoons depicting a series of unconnected poses is without story or continuity, and may not be said to be a printed literary work as referred to in section 18.” (p. 278.)



The inapplicability of the comic strip cases is also shown by decisions of the Supreme Court.

In *Bleistein v. Donaldson Lithographing Company* (1903), 188 U. S. 239, it was held that while defendant was not entitled to make a photographic copy of a Courier circus poster, which, in turn, was a photograph of an actual group, defendant, nevertheless, was entitled to pose his own group and make a like photograph, Holmes, J., saying:

“Others are free to copy the original. They are not free to copy the copy.” (p. 249.)

In *Perris v. Hexamer* (1870) 9 Otto 674, plaintiff had a copyrighted map of New York, with a system of coloring, signs, and keys which was useful to persons employed in the insurance business. Defendant made a map of the City of Philadelphia, with the same system of coloring, signs, and keys, and for the same purpose. It was held there was no infringement. Waite, C. J., said:

“The question we are to consider is, whether the publication of the defendant infringes the copyright of the complainants, and we think it does not. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy must be produced. It needs no argument to show that the defendant’s maps are not copies, either in whole or in part, of those of the complainants. They are arranged substantially on the same plan, but those of the defendant represent Philadelphia, while those of the complainants represent New York.”

See, also, our Opening Brief, pages 64-66.

(b) MAGICIAN COAT COMEDY ROUTINE.

None of the cases cited by appellee support its contention that the dinner dance scenes in "Movie Crazy" or the six or eight gags or pieces of stage business borrowed in "So's Your Uncle" are the subject matter of dramatic copyright. (Appellee's Brief pp. 31-33.)

*Corelli v. Gray*, 30 L. T. Rep. 116, referred to a book, and not to a dramatic composition.

In *Dymow v. Bolton*, 2 Cir. (1926), 11 Fed. 2d 690, "the fact findings were that a defendant playwright had 'deliberately appropriated [plaintiff's] story and dramatized it.' " (p. 692.)

*Edwards & Deutsch v. Boorman*, 7 Cir. (1926), 15 Fed. 2d 35, relates to an interest and discount time teller.

In *Sheldon v. Metro-Goldwyn-Mayer*, 2 Cir. (1936), 81 Fed. 2d 49, the motion picture, admittedly a dramatic composition, was copied almost *in toto* from a stage play, also admittedly a dramatic composition.

In *Italian Book Co. v. Rossi*, D.C.S.D. N. Y. (1928), 27 Fed. 2d 1014, defendants copied plaintiff's variation of an old Sicilian Folk Song.

In *National Institute v. Nutt*, D.C. Conn. (1928) 28 Fed. 2d 132, the action was for the infringement of a copyrighted series of memory lectures.

Manifestly, these cases do not overcome the authorities holding that without a story there is no dramatic composition.

It is scarcely necessary to reiterate that *Harold Lloyd Corporation v. Witwer, supra*, holds that the only originality protected by copyright is originality in theme.

As the Court said in that case:

“There are other definite and well-determined limitations upon the copyrightability of a plot, or sequence of events, or theme, as it is variously called.”  
(65 Fed. 2d at p. 24.)

Also,

“To constitute a dramatic composition, a work must tell a connected story or series of events.”  
(65 Fed. 2d at p. 25.)

Again, quoting from an earlier case:

“It is plain that the author of such a work [a play], where various incidents, in themselves common literary property, are grouped to form a *particular story*, must be confined, in his claim to copyright, *closely to the story he has thus composed*, and that another author, who, by materially varying the incidents, *materially changes the story*, should not be held to be an infringer.” (65 Fed. 2d, at p. 24.)  
(Italics ours.)

### (c) PUBLIC DOMAIN.

In support of its contention that public domain is not a defense appellee cites *Fisher v. Dillingham*, D. C. N. Y. (1924) 298 Fed. 145, a music case in which it was said that one is free to use all works in the public domain as sources for his compositions, but he must not copy

from another even though the latter's composition comes from the public domain. That case, however, is contrary to the *Witwer* case, and is also contrary to *MacDonald v. DuMaurier*, 2 Cir. (1944), 144 Fed. 2d 696, 701.

(d) APPELLEE'S BRIEF AS A WHOLE.

The affirmative portions of Appellee's Brief as a whole, as well as those portions to which we have particularly referred, are vitiated by the failure to recognize that cases construing other subdivisions of Section 1 of the Copyright Act cannot overthrow cases construing subdivision (d) upon which appellee's action is based; and the failure to recognize that appellee must lose unless the portion of its work borrowed, in addition to being dramatic composition and meeting other criteria, meets the constitutional requirement of promoting the "progress of science and the useful arts," that is to say, contains creative originality and not merely trivial originality.

*Corcoran v. Montgomery Ward & Co.*, *supra*, (our Op. Br., pp. 59-60) holds that appellee's claim "is governed entirely by the statute," *i. e.*, Sec. 1, sub. (d) of the Copyright Act.

In *Harold Lloyd Corporation v. Witwer*, *supra*, (our Op. Br., p. 59), the Court said:

*"The plot is common property; no one by presenting it with modern incidents can appropriate it by copyrighting."* (Italics are the Court's.) (65 Fed. 2d, at p. 24.)

In *Chamberlin v. Uris Sales Corporation, supra*, the Court said:

“Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional. Plaintiff therefore must lose unless he has shown that his work contains some substantial, not merely trivial, originality and that the defendant sold copies embodying the original aspects of his work.” (150 Fed. 2d at p. 513.)

In *Barnes v. Miner, supra*, the Court said:

“Section 8, art. I, of the Constitution of the United States, provides:

“‘The Congress shall have power \* \* \* (8) to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.’

“This provision of the Constitution not only limits the power of Congress in enacting copyright laws to matters which ‘promote the progress of science and useful arts,’ but serves to aid us in defining the words ‘dramatic composition’ found in the statute, for it is not to be supposed that Congress intended to include any compositions that would not tend to ‘promote the progress of science and useful arts.’ How anything contained in the production of the plaintiff tends in this direction it is difficult to ascertain.” (122 Fed. pp. 489-490.)

The current decisions of the United States Supreme Court closely confining patent monopolies to the precise terms of the grant are pertinent here because, as shown in *Bobbs-Merrill Co. v. Straus*, (1908), 210 U. S. 339, 345-346, the Copyright Act gives a narrower monopoly than do the patent laws.

In *Mercoïd v. Mid-Continent Investment Company*, (1914), 320 U. S. 661-665, Douglas, J., reviewing the cases, says:

“The grant of a patent is the grant of a special privilege ‘to promote the Progress of Science and useful Arts.’ Const. Art. 1, § 8. It carries, of course, a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant. (Citing cases.) It is the public interest which is dominant in the patent system. (Citing cases.) It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid (citing cases) and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant. The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly.”



VI.

**Damage Not Shown.**

In the fifty-one pages of Appellee's Brief (pp. 58-108) devoted to questions of damages, not a solitary word is said about the implied finding that all the expert testimony is untrue, or the express finding fixing special damages in a lump sum for reissue and remake rights, without allocation, although confessedly appellee's copyright monopoly does not extend to remake rights. (Our Op. Br. pp. 63-66.) Appellee is also ominously silent about the remaining controlling facts as to damages, reviewed *ante*, I, B.

These omissions, we submit, are fatal to appellee.

In *Phipps v. Commissioner of Internal Revenue*, 10 Cir. (1942), 127 Fed. 2d 214, 217, it is said:

"It does not appear what, if any, weight the Board ascribed to the expert testimony in reaching its ultimate conclusion. It may have rejected it entirely. But this it had a right to do. 'A fact-finding body may disregard the opinion of an expert and use its own judgment in arriving at value.' *Emerald Oil Co. v. Commissioner*, 10 Cir., 72 F. 2d 681, 683; see, also, *Gamble v. Commissioner*, *supra*. It may not, however, reject the opinion evidence and make an arbitrary finding of value not supported by any substantial evidence. *Emerald Oil Co. v. Commissioner*, *supra*."

As we have said, apart from the testimony of the expert witnesses, there is no direct evidence of damage, and no relevant data from which it can be inferred. (*Ante*, I. B.)

Lloyd was at pains to explain that the remaking of an old picture means making an entirely new one, and only

using the old one as a guide. [Tr. pp. 368-369.] Clearly the distribution of a remade picture is likewise a new venture, as is also the distribution of a reissued picture that is no more than a "museum piece." (See our Op. Br. p. 30.)

In *Broadway Photoplay Co. v. World Film Corporation* (1919), 225 N. Y. 104, in an opinion by the late Mr. Justice Cardozo, damages were denied for breach of contract to supply motion pictures, on the ground that the damages were no more than a mere gamble.

That decision is confirmed by common experience.

What is said in *Competition and Monopoly in American Industry* by Clair Wilcox, being Monograph No. 21 printed in 1941 for the use of the Temporary National Economic Committee, with reference to stage plays is instructive here.

It is there said:

"Close to 5,000 plays are copyrighted every year; about 100 are produced on Broadway and, of these, three-fourths are failures, less than one-tenth are hits, and only two or three run into their second year. \* \* \* Half of those presenting plays on Broadway in any season are new concerns. The mortality among these enterprises is extremely high; it is said that 95 per cent of them fail to survive a single year. 'The commercial theater in New York,' according to the editors of Theatre Arts, 'is not a business but a gamble in which a hit show is the only winning ticket.' " (p. 62.)

See, also, dissenting opinion of Jackson, J., in *Mercoid Corporation v. Mid-Continent Investment Co.*, *supra*, (320 U. S. at pp. 678-680.)



VII.

No Contributory Infringement.

Appellee undertakes to meet our position that Bruckman is not liable as an infringer, based on the express language of Section 25 of the Copyright Act, by contending that he is a contributory infringer.

Appellee's contention is not maintainable because the doctrine of contributory infringement has been substantially limited, if not undermined, by the Supreme Court, and under what, if any, that remains of the doctrine an employee in the position of Bruckman is not a contributory infringer.

In *Mercoid Corporation v. Mid-Continent Investment Co.*, *supra*, it is said in the opinion of the Court by Douglas, J.:

"The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider." (320 U. S. at p. 669.)

In the concurring opinion of Black, J., it is said:

"If there is such a wrong as contributory infringement, it must have been created by the federal patent statutes. Since they make no direct mention of such a wrong, its existence could only be rested on inferences as to Congressional intent. In searching for Congressional intent we ordinarily look to such sources as statutory language and legislative history. The dissent in question [referring to the dissenting opinion of Frankfurter, J.] mentions neither of these guides; in fact, it mentions no statute at all. Instead, the chief reliance appears to be upon the law of torts,

a quotation from a decision of a lower federal court which held that no infringement was shown, and the writer's personal views on 'morals' and 'ethics.' Not one of these references, unless it be the latter, throws enough light on the patent statutes to justify its use in construing these statutes as creating, in addition to a right of recovery for infringement, a more expansive right judicially characterized as a 'formula' of 'contributory infringement.' And for judges to rest their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business." (320 U. S. at p. 673.)

Assuming that some residuum of the doctrine of contributory infringement is left, it is not applicable here because Bruckman did not occupy a position calling for the exercise of discretion, and there was an intervening act on the part of his employer.

This is recognized in *Leon v. Pacific Telephone & Telegraph Co.*, 9 Cir. (1937), 91 Fed. 2d 484, where the Court says:

"One point remains for consideration. Defendant Dagmar Leon contends the action should have been dismissed as to her, she being no more than an employee of her husband, the defendant Fred S. Leon, with no discretion, judgment, or responsibility as to the conduct of the business.

"The point is without merit. The evidence shows Dagmar Leon to have been much more than an employee. Particularly is this shown by a letter to an agent of the Pacific Telephone & Telegraph Company, signed by Dagmar Leon, discussing prospects of the Pacific Telephone & Telegraph Company tak-

ing over the business belonging to Dagmar and Fred Leon. The letter discusses terms and conditions of the project in such fashion as to show that the writer was a responsible figure in the management of the Numerical Directory concern." (p. 487.)

In Amdur, *Copyright Law and Practice* (1936), at page 947, it is stated:

"No reported decision has been found defining the liability of mere workmen. The rule (which is thought to be analogous) in patent infringement is that workmen, although instrumental in committing the physical acts of infringement, are not liable therefor."

In *Graham v. Earl*, 9 Cir. (1897), 92 Fed. 155, a patent case, it was said at pages 160-161:

"It is well settled that a mere workman or servant who makes, uses, or vends for another, and under his immediate supervision, a patented article, is not liable in an action at law for damages which may have been sustained by the patentee by reason thereof. This rule is an apparent exception to the general principle of law which makes all who participate in a tort of misfeasance principals, and liable for damages therefor. . . ."

It is submitted that the act of Bruckman was analogous to that of a workman who built a part of a machine for his employer, calling the employer's attention to the fact that such a device had been previously used by certain specified parties, and stating or implying the workman's belief that the device was in the public domain. (See our Op. Br. pp. 27-28.)

The types of cases in which employees may be held liable for copyright infringement are illustrated by *Associated Music Publishers v. Debs Memorial Radio Fund*, 2 Cir. (1944), 141 Fed. 2d 852, where the defendant was manager of a radio station and himself selected the record whose playing infringed the plaintiff's musical copyright, and by *Buck v. Crescent Gardens Operating Co.*, D. C. D. Mass., 28 Fed. Supp. 576, where the defendant was the lessee of premises, and acted as the sublessee's agent in managing a dance hall, in addition to himself engaging, for his principal, the musicians who infringed plaintiff's musical copyright.

The authorities cited by appellee do not support its position.

In *Cain v. Universal Pictures*, D. C. S. D. Calif. (1942), 47 Fed. Supp. 1013, the court found that no infringement of any kind had occurred. The court's remarks as to who would have been liable if there had theretofore been an infringement constitute mere dicta.

Further, the case is distinguishable from the present case in that here Bruckman expressly pointed out to the producer where the material had been previously used; hence an intervening discretionary decision by Bruckman's superior whether or not to use the material previously used in "Movie Crazy" and "Loco Boy Makes Good" necessarily had to occur before any actual infringement could take place.

In *Harris v. Miller*, D. C. S. D. N. Y. (1941), 50 U. S. P. Q. 625, the authors of the infringing play were not subsidiary employees of the producer, as was Bruckman, but were principals who licensed the producers for

a royalty. The producers themselves had no knowledge that the material in the play had been previously used.

*Gross v. Van Dyke Gravure Co.*, 2 Cir. (1916), 230 Fed. 412, involved an appeal by the printer of 16,000 copies of the infringing photograph, who had sold them to the retailer, the appeal being based upon the (incorrect) theory that appellant's failure to make a profit on the transaction of itself absolved him from liability for damages. No employees of any type were in any way involved.

Appellant's quotation from this case to the effect that all who participate in an infringement are liable for damages begs the question at issue in the present case, namely, did Bruckman's acts amount to a participation in infringement in the legal sense?

In *American Telephone v. Radio Audio*, D. C. Del. (1922), 281 Fed. 200, a patent case, the licensor of an exclusive license made a contract with a third party, which, though in form was an agreement not to sue him for infringement, the court found in substance was a license. Thereafter said third party proceeded to manufacture articles embodying the patented device. In an infringement action brought by the original exclusive licensee, the third party was held to be a direct infringer, and the licensor a contributory infringer.

Appellee's quotation from the case stating that direct and contributory infringers are liable *in solido*, again is entirely irrelevant to the basic issue in the present case, *i. e.*, whether or not Bruckman is a contributory infringer. The participation of the licensor in that case was obviously utterly different in kind from the conduct of Bruckman.



In *Towle v. Ross* (D. C. Ore., 1940), 32 Fed. Supp. 125, the defendants committed the entire infringement themselves, were direct infringers.

Appellee's quotation from Howell on *Copyright Law* to the effect that joint tortfeasors are jointly and severally liable for damages restates a long-settled principle of law, but once again one which is devoid of materiality in reaching a conclusion on the present issue, viz., whether or not Bruckman is a tortfeasor.

The acts of Bruckman do not, we submit, constitute a tort.

The doctrine of contributory infringement has never been applied to a subsidiary employee where the employer is the direct infringer, and where some intervening discretionary act by the employer, with full knowledge of the facts, must necessarily occur subsequent to the employee's act before any direct infringement can take place.

If Bruckman, a "gag writer," had taken a joke book to the producer and shown him a certain sequence of jokes, which Bruckman believed to be in the public domain, for his consideration, it could hardly be argued that Bruckman thereby became a contributory infringer. He has done little, if any, more here.

Employees have been held liable in infringement cases only: (1) where they commit direct infringements themselves; or (2) where they occupy positions of discretion, often as agents, and where no intervening act of the employer need occur between the act of the employee and the occurrence of the direct infringement.



### Conclusion.

At a time when the Supreme Court has been engaged in holding that the public interest, and not the pecuniary profit of the patentee, is dominant in the patent system and in strictly confining patent monopolies to the precise terms of the grant, we undertake to say that it requires some assurance on the part of appellee to ask this Court not only to enlarge copyright monopolies given by Congress to dramatic compositions so as to include mere burlesque, but also further to enlarge such monopolies by overruling three carefully considered decisions in this Circuit and disregarding numerous well considered cases in this circuit and other jurisdictions.

It is submitted that the judgment as to Bruckman should be reversed in its entirety, with instructions to enter a judgment of dismissal.

Respectfully submitted,

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